Supreme Court, U.S.
FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

No. 82-843

In the Supreme Court of the United States

OCTOBER TERM, 1982

WHEELING-PITTSBURGH STEEL CORPORATION, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

JUDITH N. MACALUSO
BARBARA J. JOHNSON
Attorneys

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the Secretary of Labor proved that abatement of petitioner's violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), was feasible and of likely utility.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Secretary of Labor*, 578 F.2d 38 5

Babcock & Wilcox Co. v. *OSHRC*, 622 F.2d 1160 6

Champlin Petroleum Co. v. *OSHRC*, 593 F.2d 637 8

Continental Oil Co. v. *OSHRC*, 630 F.2d 446, cert. denied, 450 U.S. 965 ..... 6, 7, 8

Donovan v. *Royal Logging Co.*, 645 F.2d 882 7-8

General Dynamics Corp. v. *OSHRC*, 599 F.2d 453 ..... 5, 6, 7

Magma Copper Co. v. *Marshall*, 608 F.2d 373 .. 6

National Realty & Construction Co. v. *OSHRC*, 489 F.2d 1257 ..... 3, 6, 7, 8

Pratt & Whitney Aircraft v. *Secretary of Labor*, 649 F.2d 96 5

Voegele Co. v. *OSHRC*, 625 F.2d 1075 5

Page

Statute and regulations:

Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1) 3

29 C.F.R.:

1910.132(a) 5
1926.28(a) 5

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-843

WHEELING-PITTSBURGH STEEL CORPORATION, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported. The decision of the Occupational Safety and Health Review Commission (Pet. App. 10a-25a) and the decision of the administrative law judge (Pet. App. 3a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1982. A petition for rehearing was denied on August 24, 1982 (Pet. App. 27a). The petition for a writ of certiorari was filed on November 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a steel manufacturer with two facilities located approximately five miles apart in Steubenville and Mingo Junction, Ohio (Pet. App. 4a, 13a). Petitioner uses locomotive-powered hot metal transfer cars, referred to as

"bottles," to transport molten iron within and between the two facilities (*id.* at 4a, 14a). When a bottle, which weighs approximately 300 tons when full, is stopped, or "spotted," a groundman places a single "chock," a piece of wood three-quarters of an inch thick, three inches wide and twelve to eighteen inches long, beneath one wheel of the bottle in order to brake the entire car (*id.* at 4a-5a, 15a). Each bottle car is equipped with two hand brakes, but petitioner has neither encouraged their use nor maintained them in good repair (*id.* at 15a). At times relevant to this case, brakes on 19 of petitioner's 22 bottles were inoperable (*ibid.*).

Employees are exposed to potential injury from two sources because hand brakes are not set during spotting. First, employees may be injured in the process of setting the chocks by movement from unbraked bottles (Pet. App. 21a). Second, chocks are easily crushed by the weight of the bottles and the bottles may move enough to splash molten iron or may even roll free, striking employees or splashing them (*id.* at 16a, 17a). On several occasions, bottles have rolled unattended as far as 300-400 yards (*id.* at 4a-5a, 17a-18a, 21a). In one instance, an employee had to run beside two coupled bottles that had eluded the chocks, stopping the bottles by setting one of the hand brakes. One witness to this incident indicated that the bottles would have collided with a bumping block had the brake proved inoperable (*id.* at 17a). In addition, the bottle track traverses a work area and employees standing along the route of a runaway bottle risk being splashed by molten iron (*ibid.*).

2. As a result of an employee complaint, a compliance officer of the Occupational Safety and Health Administration (OSHA) inspected petitioner's facilities from October 4 to 8, 1976 (Pet. App. 14a). Following this inspection, the Secretary of Labor issued two citations charging that petitioner had violated the "general duty clause" of the

Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1),[1] in that brakes on bottles were not set when the bottles were spotted and were not maintained to assure correct functioning (Pet. App. 4a, 18a).

3. Petitioner contested the citations. After a hearing, the administrative law judge found that chocks "are easily crushed by the immense weight" of bottles and that "in order to place chocks under the wheels of these cars an employee must lean over and, at times, expose a part of his hand or body to injury if the car should move" (Pet. App. 4a, 5a). The administrative law judge vacated the citations, however, maintaining that the alleged hazard, which he identified as the use of chocks in lieu of hand brakes, was not recognized in the industry or by the general public (*id.* at 6a-7a). Although noting "contradictory evidence on the issue," the administrative law judge concluded that the Secretary failed to prove "that the use of wooden chocks placed under the wheels of said cars in lieu of using hand brakes on the cars is a hazardous procedure" (*id.* at 8a).

4. The Secretary obtained review of the administrative law judge's ruling with the Occupational Safety and Health Review Commission (Commission). The Commission affirmed in part and reversed in part (Pet. App. 10a-25a). After comprehensively reviewing the facts in light of the requisite elements of a general duty clause violation, the

---

[1]The general duty clause, 29 U.S.C. 654(a)(1), requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." To establish a violation, the Secretary of Labor must prove that the employer (1) failed to render his workplace free of a hazard that (2) was recognized, (3) was causing or likely to cause death or serious harm, and (4) was amenable to useful and feasible abatement measures. *National Realty & Construction Co.* v. *OSHRC*, 489 F.2d 1257, 1265-1267 (D.C. Cir. 1973).

Commission concluded that petitioner failed to render its work place free from a recognized hazard likely to cause death or serious physical harm. Specifically, the Commission held that the administrative law judge had incorrectly identified the hazard as the use of chocks rather than as "the crushing or burning of employees by the uncontrolled movements of bottle cars carrying molten metal" (*id.* at 20a-21a). The Commission also noted that this hazard was recognized, both by petitioner and the steel industry in general, because "Wheeling-Pittsburgh as well as other steel companies * * * took some measures such as chocks or hand brakes, or both, to protect against this hazard" (*id.* at 22a). The Commission also held that it was reasonably foreseeable that a chocked bottle would move and that the likely consequence would be death or serious physical harm to petitioner's employees (*id.* at 21a-22a). Finally, the Commission concluded that maintaining operable hand brakes on bottles was a useful and feasible means of abating the hazard, noting petitioner's prior use of hand brakes as well as other steel employers' use of them (*id.* at 23a-24a).

The court of appeals denied a petition for review of the Commission's decision, stating that "[t]he Commission's findings of fact are supported by substantial evidence and it applied the correct legal standards" (Pet. App. 2a).

ARGUMENT

The decision of the court of appeals, summarily affirming the Commission, does not conflict with the decisions of this Court or of any other court of appeals. The Commission's determination that the proposed means of abatement of the recognized hazard were feasible and useful reflects the appropriate legal standard. Accordingly, further review by this Court is unwarranted.

Petitioner principally contends (Pet. 8-15) that the court of appeals erred in affirming the Commission's decision because the Commission failed to apply an objective test in determining that the Secretary had proved the existence of a useful and feasible means of abating the hazard. Petitioner argues that this determination requires the Commission to consider whether a reasonable person familiar with conditions in the industry would have instituted more elaborate precautions (Pet. 8, 10). However, the central premise of petitioner's contention, *i.e.*, that such an objective test is applicable to all elements of a general duty clause violation, is manifestly incorrect.

Petitioner confuses the methods of proof relevant to establishing a useful and feasible means of abatement under the general duty clause with those methods of proof relevant to establishing a violation of the personal protective equipment standard set forth in 29 C.F.R. 1910.132(a) and 1926.28(a). Under the latter standard, personal protective equipment must be provided "wherever it is *necessary* by reason of hazards." 29 C.F.R. 1910.132(a) (emphasis added). To give employers constitutionally adequate notice of proscribed conduct by clarifying the term "necessary," the courts of appeals have imposed an objective requirement that "a reasonable man familiar with the conditions of the industry would have instituted the [proposed] protective measure." *Pratt & Whitney Aircraft* v. *Secretary of Labor*, 649 F.2d 96, 106 (2d Cir. 1981); *General Dynamics Corp.* v. *OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979).[2]

---

[2]The three cases upon which petitioner places its principal reliance use an objective test to clarify otherwise vague language in the personal protective equipment standard and the general duty clause. In *Voegele Co.* v. *OSHRC*, 625 F.2d 1075 (3d Cir. 1980), and *American Airlines, Inc.* v. *Secretary of Labor*, 578 F.2d 38 (2d Cir. 1978), the courts determined whether use of personal protective equipment was "necessary" by considering whether a reasonable safety expert familiar with

In contrast, establishing a method of abating a recognized hazard under the general duty clause requires proof of the likely utility and feasibility of the proposed measures. See, *e.g.*, *Continental Oil Co.* v. *OSHRC*, 630 F.2d 446, 449 (6th Cir. 1980), cert. denied, 450 U.S. 965 (1981); *Babcock & Wilcox Co.* v. *OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980); *National Realty & Construction Co.* v. *OSHRC*, 489 F.2d 1257, 1266-1267 (D.C. Cir. 1973). "Feasibility" is a clear and concrete term, which does not need an objective test to give employers notice of its meaning. In this case, the Commission, upheld by the court of appeals, properly found petitioner's prior use of hand brakes, coupled with evidence that other steel employers use hand brakes, determinative of feasibility (Pet. App. 23a n.4). In addition to such evidence of feasibility, the courts of appeals may also consider "whether a precaution is recognized by safety experts as feasible." *National Realty & Construction Co.* v. *OSHRC, supra*, 489 F.2d at 1266 n.37. See also *General Dynamics Corp.* v. *OSHRC, supra*, 599 F.2d at 464; *Continental Oil Co.* v. *OSHRC, supra*, 630 F.2d at 449. Although application of an objective test may yield evidence of feasibility, such a test clearly is not required.[3]

---

the industry would have instituted more elaborate precautions. Similarly, in *Magma Copper Co.* v. *Marshall*, 608 F.2d 373 (9th Cir. 1979), the court used an objective test to determine whether a hazard was "recognized" under the general duty clause. In this case, petitioner does not challenge the Commission's conclusion (Pet. App. 22a) that the Secretary established the existence of a recognized hazard likely to cause death or serious injury (see Pet. 10).

[3]Petitioner also argues (Pet. 10-11) that the Commission erred by deciding that the workplace was not "free" of the hazard without considering whether a reasonable person would have instituted more elaborate precautions. This argument is without merit. The statutory duty that an employer must maintain its workplace "free" from recognized hazards is expressed in absolute terms and thus is not subject to a reasonable person test. *National Realty & Construction Co.* v. *OSHRC, supra*, 489 F.2d at 1265. The requirement that the workplace

Equally without merit is petitioner's assertion (Pet. 8, 18) that actual industry practice, which petitioner identifies in this case as the use of chocks rather than brakes, is determinative of feasibility.[4] As the First Circuit explained in *General Dynamics Corp.* v. *OSHRC, supra,* 599 F.2d at 464:

> [W]e cannot agree * * * that the measure of the adequacy of [the employer's] safety program should be that of the industry. Such a standard would allow an entire industry to avoid liability by maintaining inadequate safety training. The purpose of the Act is to require all employers to take all feasible steps to avoid industrial accidents * * *.[W]e cannot accept a standard for the precautions which should be taken against * * * a hazard which is any less than the maximum feasible.

Thus, while industry practice may be relevant in assessing the feasibility of abatement measures, it is not, as petitioner asserts, controlling. See *Donovan* v. *Royal Logging Co.*,

---

be absolutely free of recognized hazards does not, however, lead to harsh results. Other provisions in the general duty clause limit the employer's duty to maintain a hazard-free workplace: before an employer is found in violation, the hazards must be "recognized" and must be preventable through a feasible means of abatement. *Id.* at 1265-1267.

[4]The courts have imposed an industry practice test in determining whether a particular hazard is "recognized" under the general duty clause because of the vagueness of that term. In the absence of proof of actual employer knowledge of a hazard, the Secretary must show that the condition is known generally in the industry. See, *e.g., Continental Oil Co.* v. *OSHRC, supra,* 630 F.2d at 448; *National Realty & Construction Co.* v. *OSHRC, supra,* 489 F.2d at 1265 n.32. Here, the Commission found both actual employer and general industry recognition of the hazard of bottles rolling free, demonstrated by the fact that petitioner and others in the steel industry take some measures to protect against the hazard (Pet. App. 22a).

645 F.2d 822, 830 n.6 (9th Cir 1981); *Continental Oil Co.* v. *OSHRC, supra,* 630 F.2d at 449; *National Realty & Construction Co.* v. *OSHRC, supra,* 489 F.2d at 1266 n.37. In this case, the Commission noted that some steel employers do utilize hand brakes and it correctly concluded that the use of brakes was therefore feasible (Pet. App. 19a, 23a n.4).[5]

---

[5]Petitioner also maintains (Pet. 15-19) that the court of appeals erred in affirming the Commission's allegedly unexplained rejection of factual findings made by the administrative law judge. It is well established that the Commission, not the administrative law judge, is the ultimate finder of fact. The Commission's factual findings are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. 660(a); *Champlin Petroleum Co.* v. *OSHRC,* 593 F.2d 637, 640 (5th Cir. 1979). The Commission set out in full the evidence supporting its findings. In fact, contrary to petitioner's assertion (Pet. 18), the Commission did not even reject the administrative law judge's factual finding with respect to the usual industry practice. Rather, recognizing that some steel employers do utilize hand brakes (Pet. App. 19a, 23a n.4), the Commission noted that a finding of industry-wide practice was not necessary in order to establish a violation (*id.* at 20a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

JUDITH N. MACALUSO
BARBARA J. JOHNSON
Attorneys
Department of Labor

JANUARY 1983

DOJ-1983-01